

ORIGINAL

O'CONNOR & HANNAN, L.L.P.
ATTORNEYS AT LAW

SUITE 800
1919 PENNSYLVANIA AVENUE N.W.
WASHINGTON, D.C. 20006-3483
(202) 887-1400
FAX (202) 466-2198

Audrey P. Rasmussen
Direct Dial (202) 887-1431

MINNEAPOLIS OFFICE
708 SOUTH SECOND AVENUE
700 BAKER BUILDING
MINNEAPOLIS MN 55402
(612) 341-3800
FAX (612) 343-1256

MADRID OFFICE
LA RINCONADA 6 3º
28023 MADRID SPAIN
(011) 341 575-0944
(011) 341 357-2251
FAX (011) 341 577-0759

October 15, 1996

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Federal Communications Commission
Office of Secretary

Andrew S. Fishel
Managing Director
1919 M Street, N.W., Room 852
Federal Communications Commission
Washington, D.C. 20554

Re: Opposition to Complaint About *Ex Parte* Contacts
Electronic Engineering Company
Application for Review (Refer 7110-179)
And PageMart II, Inc.
929 MHz Nationwide Exclusivity,
WT Docket No. 96-18, PP Docket No. 93-253

Dear Mr. Fishel:

This letter, on behalf of PageMart II, Inc. ("PageMart"), is in response to a document entitled "Complaint about *Ex Parte* Contacts" filed on October 3, 1996 by Electronic Engineering Company ("EEC") and another like-captioned document filed on October 9, 1996^{1/}, alleging that PageMart's participation in the above-referenced unrestricted rulemaking, WT Docket No. 96-18, In re Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, released February 9, 1996, are prohibited *ex parte* presentations with respect to EEC's Application for Review, Refer 7110-179, filed on July 5, 1995 in connection with the then Private Radio Bureau's decision which denied EEC's Petition to Dismiss PageMart's Exclusivity Request.

The "violation of *ex parte* rules" that EEC purports to bring to the Commission's attention simply does not exist. Information on PageMart's participation in an open rulemaking proceeding looking to the adoption of a new licensing scheme was available for inspection by anyone interested, and was not directed to the merits of EEC's pending Application for Review, Refer 7110-179. In its submissions in WT Docket 96-18, PageMart was discussing the effect of

^{1/} This document assumed a violation of the *ex parte* rules, which the present letter will dispel; accordingly, no further reference to the October 9, 1996 filing will be made due to its irrelevancy.

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the rules proposed in the NPRM on its, and other similarly situated parties', claim to nationwide exclusivity vis a vis a cut-off as of February 8, 1996. PageMart's submissions, written and oral, were not "presentations", let alone "*ex parte* presentations." Accordingly, no action on the part of the Managing Director is warranted.^{2/}

From the time it first adopted *ex parte* rules in Rules Governing Ex parte Communications in Hearing Proceedings, 1 F.C.C. 2d 49, 57 (1965), the Commission has made clear that restriction on communication,

does not include pleadings or testimony submitted openly in other proceedings pending before the Commission...Communications of this nature are not prohibited; nor is it required that they be served upon parties to the restricted proceeding...The rules are not intended to interfere with the participation by parties to a restricted proceeding in other proceedings of a general or specific nature pending before the Commission. (Emphasis added.)

The Commission has held on numerous occasions that a party to a restricted adjudicatory hearing did not violate the *ex parte* rules by submitting pleadings in a pending open rulemaking proceeding, even though that party's rulemaking submission might advocate a policy related to the adjudicatory proceeding in which it was involved. Thus, in RKO General, Inc. (WNAC-TV), 37 F.C.C. 2d 113 (Rev. Bd. 1972), the Review Board refused to find that RKO, a party to a contested renewal proceeding, had violated the *ex parte* rules by submitting a Petition in a rulemaking proceeding in which the Commission was evaluating whether to consider media diversification and integration as factors in a comparative renewal proceeding. As the Review Board stated,

the consequences of accepting [the renewal challenger's] argument would be that no party to a restricted proceeding could participate in a rulemaking proceeding in which policy possibly affected the restricted proceeding is under consideration. Clearly, this is not the intent of the *ex parte* rules. Supra at 114.

See also Carolina Radio of Durham, Inc., 74 F.C.C. 2d 571, 576-77 (1979), KMAP, Inc., 72 F.C.C. 2d 241, 249-50 (1979) and E.H. "Pepper" Schultz, 46 R.R. 2d 1441, 1442 (ALJ 1980) (party to comparative hearing proceeding did not violate *ex parte* rules by referring to restricted proceeding in comments filed in public rulemaking proceeding).

When revising the *ex parte* rules in 1987, in Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex parte Communications in Commission

^{2/} The Managing Director, however, may want to remind EEC of the Commission's admonition against frivolous filings. See Commission Taking Tough Measures Against Frivolous Pleadings, FCC 96-42, released February 9, 1996.

Proceedings, 2 F.C.C. 2d 3011, 3014 (1987), the Commission did not change this policy. Quite the contrary, the Commission's Report and Order adopting the new rules states plainly:

We wish to emphasize that nothing in our new definitions is intended to preclude a party to a restricted proceeding from submitting comments according to standard procedure in that proceeding...a person who is a party or interested person in a restricted proceeding is free 'to pursue other legitimate interests before the Commission,' as long as that person does not use 'the pendency of other matters as a pretext for *ex parte* communications going to the merits or outcome of a restricted proceeding.'

Under decades of Commission policy and precedent, it must be agreed that PageMart did not violate the Commission *ex parte* rules. PageMart's participation in the rulemaking proceeding was not limited because of the pendency of EEC's Application for Review, and PageMart was neither required to serve EEC copies of its written submissions nor notify it of any meetings with the Commission staff.

The above discussion aside, a communication is not *ex parte* if it is not "directed to the merits or outcome of a proceeding." 47 C.F.R. Section 1201(a). PageMart's communications cannot reasonably be read as being directed in any way to the "merits or outcome" of the EEC Application for Review.^{3/} EEC's assumptions aside, PageMart's "regulatory limbo" had nothing whatsoever to do with EEC's Application for Review and PageMart's participation was not directed at the merits of EEC's Application for Review. As EEC recognizes, PageMart did not discuss EEC's Application for Review in its submissions precisely because it wished to avoid even a reference. That PageMart incorporated the FCC letter of June 1, 1995 in the EEC litigation in order to demonstrate the viability of the request itself does not alter this conclusion, even though references to restricted proceedings in rulemakings have not been held to be an *ex parte* violation. See E.H. "Pepper" Schultz, Supra.

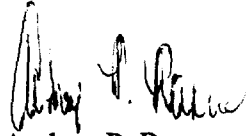
In sum, nothing in PageMart's participation in the rulemaking proceeding remotely suggests or advocates conclusions as to the merits of the issues presented in EEC's Application

^{3/} Regardless of the outcome of WT 96-18, the Commission will have to at some point dispose of EEC's Application for Review.

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for Review, Refer 7110-179. Thus, PageMart's conduct cannot reasonable be deemed to be an impermissible *ex parte* communication, and no action on the part of the Managing Director with respect to PageMart is necessary or warranted.

Very truly yours,



Audrey P. Rasmussen

APR/trs

cc: The Commissioners
Michele Farquhar
David L. Furth
Jackie Chorney
Suzanne Toller
Timothy Peterson
Timothy E. Welch